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# UNPACKING PACKAGE DEALS: SEPARATE SPHERES ARE NOT THE ANSWER

MARY ANNE CASE\*

In 1995, Francisco Valdes and I each published lengthy and detailed conceptual analyses of the ways sex, gender, and sexual orientation have been conflated in American law and the ways in which they ought to be disaggregated.<sup>1</sup> Professor Valdes's critique of this conflation in American law was balanced by a chapter in which he favorably compared Native American cultural approaches to InterSEXionality<sup>2</sup> with Euro-American ones. According to Valdes:

[T]he Native American example not only disproves the Euro-American sex/gender system's sense of essentialism, it also can spark our imagination and expand our horizons as we strive to envision post-conflationary and non-conflationary relations that, ultimately, are more in accord with the self-professed ideals and values of this nation and its laws.<sup>3</sup>

In this article, I take issue with the suggestion that the Native American model Valdes describes is a more desirable, more liberatory alternative, more consistent with the values embodied in American law. I shall focus my attention on two interdependent aspects of the Native American sex/gender system Valdes prefers. The first is a division of the

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1. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995). A third major article on a similar subject appeared at about the same time. See Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995). In a sense, Valdes, Franke, and I each centered on a different apex of the triangle formed by sex, gender, and orientation. Valdes, who seeks to break down the conflation between the three as a step toward queer legal theory, takes sexual orientation as his apex. Franke seeks to break down the category of sex and I concentrate on gender. Although each of us concerns him or herself with numerous aspects of what Valdes calls the conflation of sex, gender, and orientation, my focus is the genderbender, Valdes's the homosexual, and Franke's the transsexual.

2. This term is not my own; I take it from the title of the Symposium.

3. Valdes, *supra* note 1, at 210.

world into two roughly equal and separate spheres by gender and the second is the ability of an individual to choose between these spheres, not on the basis of biological sex alone, but on the basis of gendered inclination.<sup>4</sup> In my view such a system would contract, not expand, our present horizons. It would do little more than substitute a package deal centered around gender for the one our culture has conventionally built around sex.

I believe Valdes and I are in substantial agreement as to what would be an attractive sex/gender system: We would each like to see a world in which legal and cultural constraints on an individual's freedom to express gendered traits are minimized. The existing constraints include, not only pressure to conform gender to biological sex, but also a systematic devaluing of traits gendered feminine such that even women are often discouraged from displaying them. Our society has come a long way in allowing individuals within it to mix and match gendered traits as their personal inclination and the tasks at hand may dictate. Although it has not yet come nearly as far in equalizing the values placed on traits viewed as masculine and feminine, further reifying those traits into gendered bundles, into package deals, is not the answer. In my view, a move in the direction of separate spheres, even separate but equal spheres, even when individuals are given a meaningful choice between those spheres unconstrained by biological sex, would be a step back.<sup>5</sup> Moreover, it would be inconsistent with the best principles of American constitutional law.

The Native American system described by Valdes rests on a thoroughgoing division of life and its activities into two separate but equal and opposite gendered spheres. Everything from articles of clothing to occupations and household tasks is assigned to one sphere or the other, although the particularities of assignment may differ from one tribe to another:

Among the Zuni, for instance, men constructed dwellings, women performed the plastering. Men cultivated the corn, women supervised

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4. These two aspects of the system not only are central to Valdes's analysis, but also have been described by scholars as the "minimal conditions" for the presence of multiple genders in the Native American tradition. See Will Roscoe, *How to Become a Berdache*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 371 (Gelbert Herdt ed., 1994).

5. The objections I have to the Native American model are not quibbles about its implementation, but fundamental difficulties with its premises even when well and fully realized. I do not, therefore, propose to contest as an empirical matter whether in any particular Native American culture the spheres assigned to the sexes really were equal or whether crossing into the sphere associated with the other sex was easier for men than for women. A vast anthropological literature already debates the question whether there have ever been societies in which the sexes enjoy equal status. For a review of this literature, see SHERRY B. ORTNER, *MAKING GENDER: THE POLITICS AND EROTICS OF CULTURE* 139-80 (1996). For purposes of my analysis, I will assume a society along these lines is possible and ask whether it would be desirable.

the staple's storage and distribution; indeed, men were not allowed access to granaries at all. . . .

. . . [T]hese roles or categories were not constructed to delineate and to enforce dominant/subordinate or active/passive power relations based on sex (or gender): even though "Zuni women and men specialized in separate areas of economic, social, and spiritual life they enjoyed equal prestige and status." Equalized role allocations provided opportunity and status to members of both sexes by dispersing authority over important aspects of society along lines that roughly constituted a sex/gender checks-and-balances system.<sup>6</sup>

Assignment to one sphere or the other was not made strictly on the basis of biological sex, however. Rather, "sex merely created a presumption of gender, rebuttable as each individual discovered her or his actual gender through personal development and through manifestation of individuated social propensities."<sup>7</sup> A crucial part of this sex/gender model is a figure commonly referred to as the berdache, who is a person of one biological sex who gravitates naturally toward the role of the other sex. Typically, a berdache is someone with male genitalia and XY chromosomes who, as an adolescent, gravitates to women's work and behavior patterns and then takes on the female role, including its social status, its habitual activities, its garments and also, as a general matter, its sexual orientation, in that a male berdache usually takes as a sexual partner a traditionally masculine male, with whom he assumes a wifely role.<sup>8</sup>

Traces of something akin to berdache may be found in a variety of American communities.<sup>9</sup> Let me take the risk of suggesting two examples of what I have in mind. First, although I can neither speak as an expert, nor yet back up my claim with the sort of documentation I would like, it

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6. Valdes, *supra* note 1, at 212-13 (footnote omitted) (quoting WILL ROSCOE, *THE ZUNI MAN-WOMAN* 18 (1991)).

7. *Id.* at 212. A good illustration of the way this presumption worked itself out may be the Greek myth of Achilles's failed attempt at draft-dodging. In order to escape his being sent to a war in which it was predicted he would die, Achilles's mother disguised him in women's clothes and hid him among the women. To catch him out, the Greeks brought gifts to the group of girls among whom Achilles was hiding. While all the others selected beads and trinkets, Achilles alone chose a sword, thereby revealing his masculine gender. In Native American terms, Achilles, by choosing the bow and not the burden strap, has indicated his masculine gender. See Harriet Whitehead, *The Bow and the Burden Strap: A New Look at Institutional Homosexuality in Native North America*, in *SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY* 80, 87 (Sherry B. Ortner & Harriet Whitehead eds., 1982).

8. See Valdes, *supra* note 1, at 224-25. There is much dispute among historians and other scholars of the Native American sex/gender system about the exact parameters of berdache. Areas of disagreement (and perhaps of tribal variation) include the extent to which a berdache was seen as a "third gender" rather than as someone who had crossed all the way from one gender to the other, whether women had opportunities comparable to men to become berdache, and whether bisexuality and other liminal behavior was an option for berdache. See *id.* at 226, 232-33. For purposes of this article, these disputes, though interesting and relevant, do not need to be resolved.

9. Again, I mean my discussion of berdache-like elements in these communities to be compared primarily with Valdes's ideal of berdache, rather than with the actual practices of berdache in any particular Native American community.

seems that there is something akin to the berdache tradition in the lives of some African American gay men.<sup>10</sup> I have earlier had occasion to note that the majority of legal challenges brought by effeminate men were brought by black men.<sup>11</sup> These include Bennie Smith, who unsuccessfully challenged another black man's refusal to hire him simply on the grounds that Smith was "effeminate;"<sup>12</sup> Anthony Slater, who successfully petitioned to appear at his public high school graduation in women's clothing;<sup>13</sup> Darrell Williamson, who unsuccessfully claimed race discrimination when fired for wearing makeup on the job;<sup>14</sup> and Ernest Dillon who unsuccessfully claimed that the anti-gay harassment he suffered as a postal employee resulted from impermissible sex-stereotyping.<sup>15</sup> In addition, one of the few ultimately successful challenges to the U.S. military policy of excluding homosexuals was brought by Sgt. Perry Watkins, a flamboyantly effeminate black "queen" who was reported to have ingratiated himself with his fellow soldiers, inter alia, by performing as a female impersonator.<sup>16</sup> Might it be that these effeminate black men are occupying a space akin to the berdache, such that exaggerated effeminacy becomes the safest alternative in a culture prone both to impose hypermasculinity as a model for black men and to see such hypermasculinity as a threat? Might it also be that the strong role women have played in African American culture makes the choice between the masculine and feminine spheres a more balanced one for black than for white Americans?<sup>17</sup>

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10. I wish there were a similarly extensive body of sociological and historical scholarship here as there is on the Native American berdache tradition. Unfortunately, in its absence, I have had to rely more than I would have wished to on anecdote and speculation.

11. See Case, *supra* note 1, at 50 n.166.

12. Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 329 (5th Cir. 1978).

13. Richard Leiby, *Clothed in Controversy: He's a 16-Year Old Gay Transvestite. Somehow, Anthony Slater Has Made Life Work*, WASH. POST, Sept. 7, 1994, at C1.

14. Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989).

15. Dillon v. Frank, No. 90-2290, 1992 WL 5436, at \*5, \*10 (6th Cir. Jan. 15, 1992).

16. Watkins v. United States Army, 875 F.2d 699, 701-02, 711 (9th Cir. 1989).

17. See, e.g., LEON E. PETTIWAY, HONEY, HONEY, MISS THANG: BEING BLACK, GAY, AND ON THE STREETS at xxxiv-xxxv (1996). Reporting of the black drag queens who are the subject of his book, Pettitway writes:

They portray their mothers as matriarchs like those who have so often been depicted ruling their nests in sitcoms as well as the academic press . . . . [M]others are resourceful providers who are strong and determined, and who are the first lines of defense from both internal and external threats to their children's emotional and physical well-being.

Therefore, in comparison to men, women are good.

*Id.* Consider also the subculture of (male or transgender) participants in competitive drag/voguing depicted in the documentary *Paris Is Burning*, who organize themselves into groups called "houses" whose leaders are called "mothers." PARIS IS BURNING (Miramax 1991). Filmmaker Jenny Livingston interviewed the mothers of two of the most successful houses. Although both were viewed as successful leaders (whether measured by number of followers attracted, satisfaction of the followers, competitive success of the members of the house, or general prestige), both also differed markedly in approach in ways that social scientists (although apparently not the two mothers themselves) would view as sharply gendered. One described the role of a "mother" as leading the house into battle, being tough, strong, and competitive; the other spoke of a "mother's" role as

Some further evidence that a berdache-like role may provide a safe space for young African American men who might otherwise be castigated as sissies comes from reports of community acceptance, indeed encouragement, of cross-dressing on the part of effeminate or homosexually inclined African American adolescents. Thus, the Lady Chablis, the African American drag queen who played a central role in *Midnight in the Garden of Good and Evil*,<sup>18</sup> sets forth in an autobiography the experience of some parental resistance,<sup>19</sup> but substantial community support, for an adolescent transition from "sissy" to "the woman [s/he had] become."<sup>20</sup> As Chablis puts it:

I was the first openly and flamboyantly "gay" person I knew of in my hometown. That being the way, I guess I was protected by my family, much the way a retarded child is looked after. I mean, Gran'mama knew I was a sissy, and while I don't think she liked it, her boundless love for me would never have allowed her to harp on the fact that I needed to make drastic changes. Besides, she didn't believe in tampering with what was purely the Lord's business. And she made sure I knew that a higher power ultimately called the shots.<sup>21</sup>

While there are clearly dissimilarities and a lack of full acceptance, the process Chablis describes does have a certain resemblance to the Native American notion of the "cooking" of gender. Cooking, as Valdes describes it, "revealed gender: as the individual grew and incrementally performed and embraced one gender or another, or a mixture, he or she became that gender regardless of the genital anatomy under his or her garments."<sup>22</sup>

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comforter and nurturer of the members of the house. *Id.* (Again, remember that both mothers are genetic males flourishing in a subculture that glories in their effeminacy). Not only is strong leadership potential here identified with a female role, the voguing subculture also demonstrates that both stereotypically masculine qualities and stereotypically feminine qualities can be seen by a successful leader as the key to success. As the work of a white lesbian depicting the lives of gay men of color, Livingston's film has generated much critical commentary. See, e.g., JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 121-40 (1993); BELL HOOKS, REEL TO REAL: RACE, CLASS, AND SEX AT THE MOVIES 214-26 (1996); JACQUELINE ZITA, BODY TALK: PHILOSOPHICAL REFLECTIONS ON SEX AND GENDER 182-201 (1998); Jackie Goldsby, *Queens of Language: Paris Is Burning*, in QUEER LOOKS: PERSPECTIVES ON LESBIAN AND GAY FILM AND VIDEO 108-15 (Martha Gever et al. eds., 1993). Of course, in writing this article, I run some of the same risks as Livingston, but I can see no way to avoid these risks short of avoiding the subject entirely.

18. JOHN BERENDT, MIDNIGHT IN THE GARDEN OF GOOD AND EVIL: A SAVANNAH STORY (1994), adapted and released as a motion picture, MIDNIGHT IN THE GARDEN OF GOOD AND EVIL (Warner Bros. 1997).

19. As the resistance included severe beatings by a mother and stepfather virulently opposed to Chablis's effeminacy and homosexuality, I do not mean to suggest that acceptance was complete and easy.

20. THE LADY CHABLIS WITH THEODORE BOULOUKOS, HIDING MY CANDY: THE AUTOBIOGRAPHY OF THE GRAND EMPRESS OF SAVANNAH 45 (1996) [hereinafter THE LADY CHABLIS, HIDING MY CANDY].

21. *Id.* at 39.

22. Valdes, *supra* note 1, at 217.

Chablis describes taking an early interest in feminine activities such as food preparation and hair care, which his grandmother indulged to a point and then resisted.<sup>23</sup> Initially upset by a failure to interest his twelve-year-old son in baseball, Chablis's father then enrolled him in a sewing course at the Harlem Institute of Fashion, where s/he was thrilled to meet another "[v]ery fem'nine" gay man wearing "pink ruffled shirts . . . [and] lotsa rings and bracelets."<sup>24</sup>

Much like a traditional berdache's, Chablis's "decision became final at puberty when the youth adopted female dress."<sup>25</sup> Also like a berdache, Chablis found particular support for this decision among the women of the community.<sup>26</sup> Thus, Chablis's early experiments in cross-dressing at age fourteen were facilitated by hand-me-downs from two neighbor girls and encouraged by female teachers who described Chablis's look as "so good, *so natural*"<sup>27</sup> and helped improve it with page boy hair-styling and lessons in mascara use.<sup>28</sup> S/he moved in with a sympathetic neighbor, Rhonda Conyers, and expanded her feminine wardrobe, which s/he wore everywhere but to church.<sup>29</sup> Soon the whole community was "donating something to my cause for womanhood" as well as calling the youth "Miss Benji" or "Miss Pee-Wee."<sup>30</sup>

I never worried none about "passing." The kindly folks in Quincy already knew who and what I was, and they accepted me as Miss Benji or Miss Pee-Wee without any real degree of fanfare. While I wasn't exactly stuffing my bra, I did work my God-given illusions to the max. And enhanced now by the magic of Miss Rhonda Conyers, my cosmetic transition was all but complete. Whether it was a midriff and cutoffs or strippy-strappy sandals and rayon evening pajamas, there was no question that The Doll was coming of age just in time for her sixteenth birthday.

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. . . I was perceived as a girl 'cause I carried myself like one. And if I was ever regarded as an oddity, I was also a damn sure *likable* one!<sup>31</sup>

The Lady Chablis's experience is not unique. Critical race theorist Kendall Thomas has, for example, recounted to me in conversation the

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23. See THE LADY CHABLIS, HIDING MY CANDY, *supra* note 20, at 39.

24. *Id.* at 44.

25. WILL ROSCOE, THE ZUNI MAN-WOMAN 22 (1991).

26. *Id.* at 22-23.

27. THE LADY CHABLIS, HIDING MY CANDY, *supra* note 20, at 61.

28. *Id.*

29. *Id.*

30. *Id.* at 65.

31. *Id.* at 67, 70.

similar story of one of his neighbors growing up.<sup>32</sup> Professor Thomas's account contains within it a sense of the community's fear of liminality, the sense that being squarely on one side of the line or the other is safer.<sup>33</sup> For Thomas, the neighbor boy's experience was an object lesson in the risk of letting his own feminine tendencies show—if they were spotted he might find himself pushed willy-nilly into a dress and a female role. This insistence on gender role as a package deal is, for me, the grim side of berdache, as the bright side, stressed by Valdes, is its willingness to let inclination and not simply anatomy dictate behavior.

Lest I be seen as confining my analysis of berdache to communities of color, treating them as exotica, let me use as my final illustration of the grim side of berdache an example from the mainstream upper-class white community of a New England prep school. The example, admittedly fictional, comes from the 1956 movie, *Tea and Sympathy*,<sup>34</sup> adapted from Robert Anderson's 1953 Broadway hit of the same name. The movie's central character, Tom Lee, is an effeminate adolescent whose father has sent him to prep school in hopes of "making a man" of him. Once they observe his feminine inclinations, however, his classmates seem determined instead to make a woman out of him, first letting him into the drama club only if he takes a female part and wears a dress; then calling him "sister boy," using female pronouns to refer to him, and mercilessly teasing him to the brink of suicide.<sup>35</sup>

Most of those around Tom Lee see only two options—two separate and opposite spheres, masculine and feminine—and they are determined to push him into one or the other.<sup>36</sup> Like the Native Americans Valdes

32. Kendall Thomas, a Professor of Law at Columbia University School of Law, participated in the InterSEXionality Symposium sponsored by the University of Denver College of Law and *Denver University Law Review* on February 6–7, 1998.

33. Fear of the liminal may also have played a part in the sexual harassment of an earring-wearing teenage boy in *Doe v. City of Belleville*, 119 F.3d 563, 566 (7th Cir. 1997). Co-workers repeatedly asked Doe, "Are you a boy or a girl?" *Doe*, 119 F.3d at 566. They called him "bitch" and eventually grabbed him by the testicles in an attempt "to finally find out if you are a girl or a guy." *Id.* at 567. "The sense of distinction," writes Pierre Bourdieu,

which demands that certain things be brought together and others be kept apart, which excludes . . . all unions contrary to the common classification[,] . . . responds with visceral, murderous horror, absolute disgust, metaphysical fury, to everything which lies in Plato's "hybrid zone," everything . . . which by challenging the principles of the incarnate social order, especially the socially constituted principles of the sexual division of labor and the division of sexual labor, violates the mental order, scandalously flouting common sense.

PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE*, ch. 4 (Richard Nice trans., Harvard Univ. Press 1984) (1979).

34. *TEA AND SYMPATHY* (MGM 1956), adapted from ROBERT WOODRUFF ANDERSON, *TEA AND SYMPATHY* (Random House Play 1953).

35. *Id.*

36. While Tom's classmates sought to categorize him as an effeminate homosexual, similar childhood experiences shaped Christine (born George) Jorgensen's decision to seek a sex change. Jorgensen reported being accused of carrying school books like a girl or being a girl dressed in boys' clothing. See CHRISTINE JORGENSEN, *A PERSONAL AUTOBIOGRAPHY* 16 (1967). An elementary-school teacher who found a piece of needlepoint in Jorgensen's desk called Jorgensen's mother to



described, their view is that, "You can't escape from what you are, your character."<sup>37</sup> The manliness of Tom's character is put in doubt by his taste for chintz curtains and flowers, folk songs and poetry, and by his unwillingness to get a crew cut or plaster his walls with pinups from girly magazines. Like the male berdache, Tom prefers spending time with women doing women's tasks—his troubles come to a head when his classmates observe him opting to join the faculty wives' sewing circle rather than accompany the boys on an athletic romp.<sup>38</sup> Tom sews quite well. He is also the school's tennis champion; unfortunately, he wins by "playing like a girl," causing his classmates to deride his championship game as "the mixed singles final."<sup>39</sup> But to isolate Tom in a feminine sphere where "the nasty rough boys can't hurt" him is no more fair to his inclinations than to force him into conventional manliness.<sup>40</sup> As his headmaster's wife, Tom's only defender, puts it: "Manliness is not all swagger and swearing and mountain climbing. Manliness is also tenderness, gentleness, consideration."<sup>41</sup>

I propose to read *Tea and Sympathy* straight.<sup>42</sup> That is to say I shall take at face value that it is not about a repressed gay youth, who today might come out of the closet. Instead, it is about an unusually sensitive and feminine heterosexual boy, who ends his prep school career in the arms of his headmaster's wife (his love object throughout the movie), a boy who, in the movie's epilogue, is revealed to have grown into a happily married man and an accomplished author.

In addition to the tendency to polarize gender, another disturbing tendency in the berdache tradition is the tendency to push effeminate men, as well as masculine women, toward homosexuality.<sup>43</sup> It also tends to push everyone, whether gender conforming or cross-gendered, erotically toward his or her opposite. What is interesting about *Tea and Sym-*

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school to ask, "[D]o you think this is anything for a red-blooded boy to have in his desk as a keepsake? The next thing we know George will be bringing his knitting to school." *Id.* at 15. On one account, then, the berdache tradition may free people like Lee and Jorgensen from needing to keep or acquire one part of what has been the socially accepted package deal of sex, gender, and orientation—it allows them to take up their sewing without first having to acquire a vagina. Although it may package gender and add to it orientation, berdache does not prescribe genital conformity to this package.

37. *TEA AND SYMPATHY*, *supra* note 34.

38. This marks an important difference between the play and the movie adaptation. While the movie's central theme is gender, the play's is sexual orientation. Thus, in the play, Tom Lee's troubles trace to his being observed, not sewing with the faculty wives, but going for a swim in the nude with an unmarried male instructor.

39. *TEA AND SYMPATHY*, *supra* note 34.

40. *Id.*

41. *Id.*

42. Pun intended.

43. Perhaps the only instances in contemporary American culture in which homosexual identity may be externally imposed may be certain genderbenders—effeminate boys and tomboys—pushed into gay identity by an outside world only too ready to typecast.

*pathy* is that Tom Lee is drawn erotically toward his like, but his like in terms of gender, not of sex: He wants a soft, romantic, loving view of sex and resists the rough, loveless, promiscuous masculine view of sex that he is pushed to seek with the lower class waitress to whom all the other boys go when they want to get laid. Instead, he finds his sexual and romantic ideal with someone who is (a) of the opposite sex, but also (b) of the same gender. As I understand the berdache tradition, it cannot accommodate the world's Tom Lees much more comfortably than can the Euro-American conflation Valdes rightly criticizes.<sup>44</sup>

The problem with the berdache model is that it is a package deal. And I resist package deals. Perhaps this is because I studied antitrust law at an impressionable age. United States antitrust law prohibits what is known as a tying arrangement—an arrangement by which customers can acquire a product they really want only on condition that they also purchase another in which they have no interest.<sup>45</sup> Berdache and the world of separate spheres in which it is imbedded force people into accepting such tying arrangements—it forces them to acquire the whole of a gendered package to get the part of it that suits them.

Berdache is not a solution to the problem of separate spheres, although it is concededly an improvement over a world in which assignment to those spheres is by biological sex alone. In the traditional nineteenth-century American world of spheres separated by sex, for example, Myra Bradwell was told by a Justice of the U.S. Supreme Court that, as a woman, she could not be licensed to practice law because it was “the domestic sphere . . . which properly belongs to the domain and functions of womanhood.”<sup>46</sup> It would not be enough of an improvement if Bradwell's twentieth-century female counterpart were to be told instead that she can practice law only if she is a butch lesbian. This would be unfortunate both for individual human freedom and for the practice of law, which, as Bradwell's lawyer Matthew Hale Carpenter argued to the Supreme Court, can benefit from both masculine “sternness” and a “silver [feminine] voice.”<sup>47</sup>

Now that the *Bradwell* case has been repudiated, how clear is it that American constitutional law also repudiates package deals for the sexes?

44. Even among those accepting of homosexuality and transgenderism, persons who desire others of the same gender can lack for acceptance. Although she apologizes by the end of the novel, Jess, the transgendered heroine of *Stone Butch Blues*, is initially distressed by the relationship between two of her butch friends: “The more I thought about the two of them being lovers, the more it upset me. . . . [T]wo butches? How could they be attracted to each other? Who was the femme in bed?” LESLIE FEINBERG, *STONE BUTCH BLUES* 202 (1993).

45. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6 (1958). These days, some antitrust scholars do not think much of the prohibition on tying, but their criticisms reached me too late to have much influence on my personal intellectual history. For a scathing critique of prohibitions on tying, see ROBERT H. BORK, *THE ANTITRUST PARADOX* 365–81 (1978).

46. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

47. *Bradwell*, 83 U.S. at 137.

Concurring in *United States v. Virginia*,<sup>48</sup> Chief Justice Rehnquist insisted:

[I]t is not the "exclusion of women" [from the state-sponsored Virginia Military Institute] that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any—much less a comparable—institution for women . . . . An adequate remedy in my opinion might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution. To demonstrate such, the Commonwealth does not need to create two institutions with the same number of faculty Ph.D.'s, similar SAT scores, or comparable athletic fields. Nor would it necessarily require that the women's institution offer the same curriculum as the men's; one could be strong in computer science, the other could be strong in liberal arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber.<sup>49</sup>

This sounds suspiciously like a vision of separate (but equal) spheres, a vision of equality in sexual difference often announced, but never, to my mind, realized.<sup>50</sup> As with the separate but equal racial spheres categorically rejected in *Brown v. Board of Education*<sup>51</sup> and its progeny, much of the problem with constitutionally endorsed, state enforced separate spheres for the sexes may be a practical one—as Justice Souter noted at oral argument in *United States v. Virginia*, because we do not stand "on the world's first morning"<sup>52</sup> with respect to sex distinctions, but rather at the close of millennia of subordination, continued separation of the sexes along the remedial lines suggested by Rehnquist cannot be free of subordinating taint.<sup>53</sup>

I would argue, however, that the objections go beyond impracticability. There are two main ways of formulating the principle behind the constitutional norm against the denial of equal protection on grounds of

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48. 518 U.S. 515 (1996).

49. *Virginia*, 518 U.S. at 565 (Rehnquist, J., concurring) (internal citation omitted).

50. Lest one think that, pace Rehnquist, there is no realistic likelihood of a court's endorsement of separate spheres under current American law, consider, for example, *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994), involving the sex-segregated sphere of the prison. In that case, the circuit court held it to violate the rights of neither male nor female prisoners for a prison system to choose to allocate resources so that female prisoners, but not males, were allowed overnight visits with their children, while male prisoners, but not females, were given extensive vocational training. *Klinger*, 31 F.3d at 732–33.

51. 347 U.S. 483 (1954).

52. United States Supreme Court Official Transcript at 18, *United States v. Virginia*, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107), available in 1996 WL 16020, at \*18.

53. To the extent that the anti-subordination and anti-differentiation goals of the constitutional law of sex discrimination are in tension, Rehnquist emphasizes anti-subordination, for example by repeatedly objecting to heightened scrutiny for laws favoring men. *Virginia*, 518 U.S. at 559–60, 565. For further discussion, see Mary Anne Case, *The Very Stereotype the Law Condemns: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies* (unpublished manuscript on file with the author).

sex. The first is that women should not be subordinated, by the law or, more broadly, by men. The second is that sex should be irrelevant to an individual's treatment by the law, and, more broadly, to his or her life chances. On the latter view, "fixed notions concerning the roles and abilities of males and females"<sup>54</sup> are problematic when embodied in law, even in law that does not in any articulable way subordinate women to men. Our current constitutional law of sex discrimination clearly and, I would argue, appropriately, encompasses this latter view, and does not limit itself to questions of subordination.

The constitutional principle that "[t]here is no caste here"<sup>55</sup> is not cashed out by "[t]here is no subordination" here. "Our Constitution . . . neither knows nor tolerates classes among citizens," not even separate but equal classes.<sup>56</sup> Imagine, for example, a society with two castes, not upper and lower, not Brahmin and untouchable, but priest and warrior. This is not all that far-fetched a hypothetical, at least in its assumption that there can be equality in difference. Consider, for example, the estates of the clergy and nobility in medieval and early modern France. The relationship between these, the First and Second Estates, presents a somewhat different problem than the conventional one of subordination framed by the position of the Third Estate. Both clergy and nobility ran the gamut of wealth and power, from the impoverished country squire and village priest to the prelates and princes of the royal line. And the two estates were distributed throughout the land. Although nominally the clergy was the premier estate, the nobility was hardly subordinate. Role differentiation, rather than inequality, marked the difference between the two. The two castes are roughly equal in status, but radically different in role. Those assigned to the priest caste are limited to the role of priest even if they would rather fight than pray, and vice versa. Is such a division consistent with the American Constitution? I don't think so.<sup>57</sup>

Ironically, strong support for the proposition I am here advancing comes from none other than Justice Bradley, who, in his *Slaughterhouse* dissent, asked:

[I]f a State legislature should pass a law of caste, making all trades or professions, or certain enumerated trades and professions, hereditary, so that no one could follow any such trades or professions except that

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54. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

55. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

56. *Plessy*, 163 U.S. at 559.

57. See, e.g., *Wright v. Rockefeller*, 376 U.S. 52, 63–64 (1964) (Douglas, J., dissenting) (rejecting as un-American the Indian system of allocating parliamentary seats by religion and ethnic group). I realize I am building my argument here largely from dissenting Supreme Court opinions, but this, too, has become part of the American constitutional tradition, which has come to accord special status to eloquent and prescient dissents, from Harlan in *Plessy v. Ferguson* to those of Holmes and Brandeis in the free speech cases. See, e.g., HARRY KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 158 (1988).

which was pursued by his father, would such a law violate the privileges and immunities of the people of that State . . . ?<sup>58</sup>

He then answered:

In my view, a law which prohibits a large class of citizens from adopting a lawful employment . . . does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws . . . .<sup>59</sup>

As Harlan's *Plessy* dissent makes clear, the problems with equality of separate spheres exceed the practical—the Constitution guarantees liberty as well as equality; indeed, the constitutional equality norm itself has regularly been interpreted to guarantee equal liberty. I would say of Rehnquist's remedy for *United States v. Virginia* what Harlan said of the legislation at issue in *Plessy*: "Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States."<sup>60</sup> My contention is that, under the Constitution, no less than under Title VII,<sup>61</sup> "[a]s for the legal relevance of sex stereotyping, we are beyond the day when [individuals of either sex can be] evaluate[d] by assuming or insisting that they match[] the stereotype associated with their group."<sup>62</sup> This is so whether or not that stereotype is itself subordinating or demeaning.

Substituting a berdache-like system of preferences for de jure exclusion of one sex from the other's activities or professions would not solve the problem, as the Supreme Court suggested in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.<sup>63</sup> In that case, the passage of laws prohibiting sex discrimination in employment led a newspaper

58. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 113 (1872) (Bradley, J., dissenting).

59. *Id.* at 122. Bradley viewed it as a settled question that the law he hypothesized would be a violation of privileges and immunities; the only question he considered was whether the violation was of the privileges of federal as well as state citizenship. *See id.* But see *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 562 (1947) (upholding a licensing scheme for New Orleans river pilots that in effect allowed "the male members of a family [to] follow the same work from generation to generation" and closed that line of work to all without family connections). Once again in *Kotch*, the position I am advocating here is put forth by the dissent, which insisted that, even if it were to prove the most efficient means of selecting pilots, a selection system based on blood relationship, like one based on "race, color, creed and the like," is forbidden by the U.S. Constitution. *See Kotch*, 330 U.S. at 566 (Rutledge, J., dissenting). This is very much in line with the rejection of even very good proxies in modern constitutional sex discrimination cases.

60. *Plessy*, 163 U.S. at 1145.

61. Civil Rights Acts of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1994).

62. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). Note that the rejection of comparable worth as even a statutory, let alone a constitutional, principle in American law, can be seen as a rejection of the equalization of separate spheres as a solution to women's subordination.

63. 413 U.S. 376, 388–89 (1973) (holding that a local anti-discrimination ordinance prohibiting a newspaper from classifying help-wanted ads by sex did not violate the newspaper's First Amendment rights).

merely to change the headings on its help wanted ads to classify jobs no longer as "help wanted male" or "female," but instead as "male interest" or "female interest."<sup>64</sup> Like the proxies used to generate the sex respecting rules struck down by the Court in constitutional cases, this classification by interest probably was accurate more often than not. But the self-reinforcing stereotypical assumption that male and female interests fall in separate spheres was held unacceptable in the statutory as it has also been in the constitutional context.<sup>65</sup>

Although I do not urge an abolition of conventional gender categories, I am troubled by the alternative of berdache because I am also not committed as either a descriptive or a normative matter to the preservation of these categories. I would neither be particularly surprised nor particularly disappointed if masculinity and femininity as we today define them were to be amalgamated, to be diversified, or to wither away in future generations. I, therefore, worry about two sorts of potential gender essentialism—not merely the essentializing of women as feminine, but the essentializing of the feminine itself. Separate gendered spheres, however open to persons of both sexes, increase the risk of reifying current definitions of masculine and feminine, which I would prefer had more room to develop, even to disappear.

If not berdache, what would serve as a useful model for the disaggregation of sex from gender? As I have already observed, it may seem doubly paradoxical to suggest both that gender can be disaggregated from sex and that it may then wither away. After all, gender now is defined as that which is deemed culturally appropriate for members of a particular sex. If gender to begin with is defined entirely in terms of sex, a disaggregation, if conceivable at all, seems likely to involve reifying those bundles of characteristics associated with masculinity or femininity at the time they are split off from maleness or femaleness. There are, however, historical precedents for the sort of conceptual shift I am here imagining, and a brief discussion of two of them may help illuminate the point.<sup>66</sup>

The first analogous precedent is that of the categories "noble" and "base;" the second is that of the humors or temperaments. Both examples involve classification schemes once quite prevalent, but which have lost virtually all significance in our contemporary American society.<sup>67</sup> In each case, the categories were, like that of gender, originally seen to have a physiological base from which they were then conceptually disaggregated. Thus, those with noble blood were seen to possess a variety of desirable characteristics the base-born lacked, from good bone structure

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64. *Pittsburgh Press Co.*, 413 U.S. at 379–80.

65. Again, for further discussion, see Case, *supra* note 53.

66. See Case, *supra* note 1, at 105 n.261 (exploring the historical precedents).

67. Although surely not in all societies, as British members of the audience rightly insisted when I delivered a version of this argument at the 1996 Law and Society conference in Glasgow.

to good character, to grace and virtuosity. But as early as the time of Chaucer, the qualities associated with nobility could be disaggregated from the bloodlines that were thought to give rise to them and those possessing such qualities could be characterized as noble regardless of their actual class origin. "[H]e is gentil [i.e., noble] that dooth gentil deedes," says Chaucer's Wife of Bath,<sup>68</sup> although for centuries thereafter in literature, apparently base-born people who behaved nobly usually turned out to have been switched at birth. Similarly, today, some transsexuals assert that because they manifest feminine gender characteristics in a male body, they must have been assigned to the wrong sex.

Over time, the qualities associated with nobility not only took on a life of their own, far removed from their origins, but noble/base also ceased to be an important fault line in the categorization of human beings in this society. This is not at all to argue that class distinctions have lost their meaning. But, in contemporary America at least, class has not only become more fluid than it was in medieval Europe, it has also become far less of a package deal. The qualities seen as united of necessity in an individual medieval or Renaissance nobleman are in the United States today acknowledged to be dispersed over a wide variety of elites, such as those defined by ancestry (e.g., Mayflower descendants), education (e.g., Ivy League grads), wealth (e.g., members of the Forbes 400), looks (e.g., supermodels), talent (from Nobel prize winners to Hall of Fame athletes) and power. Of course, some individuals do possess most or all the marks of high status. But it is no longer assumed that to possess one, one must possess the others.

The first step in this process of disaggregation came when nobility was viewed as something one could manifest by one's behavior rather than simply through one's blood lines. Today, all men are or can be gentlemen and all women ladies.<sup>69</sup> And, for example, although the word "villain" still has contemporary significance, it has lost all resonance of its etymological origin in "villein" or "base-born." As Richard Rorty suggests, perhaps the distinctions and androcentric value judgements today associated with sex and gender may some day be forgotten, "just as we have forgotten all about the discussion between base and noble ancestry."<sup>70</sup>

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68. Geoffrey Chaucer, *The Wife of Bath's Tale*, in CHAUCER'S POETRY 228 (E.T. Donaldson ed., 2d ed., Ronald Press Co. 1975).

69. And all women gentlemen as well? See LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 85 (1997) (describing a Yale Law School professor's justification of addressing all in his class, regardless of sex, as "gentlemen," since women law students, too, should cultivate the civilized detachment associated with the gentlemanly ideal); cf. LUISE F. PUSCH, ALLE MENSCHEN WERDEN SCHWESTERN (1990) (exploring the difference in emphasis created by change in gender of words, e.g., when "alle Menschen" ("all human beings") are described as "sisters" ("Schwestern") instead of "brothers").

70. Richard Rorty, *Feminism and Pragmatism*, 30 MICH. Q. REV. 231, 248 (1991).

A world in which people can, if they wish, forget about sex and gender distinctions, a world in which the possibilities of liberal individualism and universalism can be better realized, strikes me as more attractive than one in which sex and gender necessarily retain their salience but change some of their valence. Thus, for many of the same reasons I resist Valdes's enthusiasm for berdache, I am not satisfied by Rorty's alternative vision, in which women have the chance, previously denied them, to find their moral identity in being women. According to Rorty:

To find one's moral identity in being an X means being able to do the following sort of thing: make your Xness salient in your justification of important uncoerced choices, make your Xness an important part of the story you tell yourself when you need to recover your self-confidence, make your relations with other X's central to your claim to be a responsible person. These are all things men have usually been able to do by reminding themselves that they are, come what may men. They are things which men have made it hard for women to do by reminding themselves that they are women.

....

... [W]omen are only now in the process of achieving a moral identity as women.<sup>71</sup>

While I have no objection if those women who wish to do so find their moral identity in being women, I no more see this as the utopian ideal than I do an equalization of separate spheres. For me, it is only when women *can*, but *need not*, find a moral identity in being women, that women's liberation will have come. To put this in Rorty's terms, this day will come when the poet Adrienne Rich can join the club of poets if she wishes, and be welcomed to membership by poets of both sexes. For me it is not enough if Rich is restricted to the option Rorty imagines for her, that of starting a "feminist separatist[t]" club of female poets once she realizes she can never be one of the "band of brothers," the "invisible club" of "young male" poets from Byron and Goethe to their present day male counterparts.<sup>72</sup>

Pressing too closely the analogies between noble and base and masculine and feminine would not be in the interests of someone like myself who wants feminine qualities to be more highly valued than they have been, however. This is because even today we still think villains are bad, and we still associate goodness with most things previously deemed noble. Indeed, just about the only item I can think of whose valence has clearly shifted is bread—whole grain bread was once consumed by peasants and despised by nobles, who preferred white bread made of refined flour. Today, white bread is more closely associated with the lower classes, while those of higher status tend to prefer whole wheat or even seven grain bread.

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71. *Id.* at 243–44.

72. *Id.* at 246.



The more the masculine is seen to resemble the noble, the less space remains for the feminine, even (indeed especially) in a world in which masculinity, like nobility, is seen as open to all who choose it. For this reason an analogy to the concept of the humors, which did not embody the stark normative contrast of good and bad, may be helpful in addition. Temperaments such as the melancholic or choleric were originally seen as dictated by and associated with a specific physiology "and the words carried much weight that they have since lost: e.g., the choleric man was not only quick to anger but also yellow-faced, lean, hairy, proud, ambitious, revengeful and shrewd."<sup>73</sup> Today, however, although to describe someone as choleric is not meaningless, we have not only ceased to view persons of choleric temperament as by nature hot and dry and filled with an excess of yellow bile, we are also quite unlikely to use the humors as a basis for categorizing or evaluating people in the first place.

My final analogy is much more up to date. If, as some have suggested, choosing sexual orientation can be analogized to choosing clothing, then the separate spheres of the berdache tradition may be akin to "getting your colors done." Those who followed this theory of fashion, popular in the 1980s and enjoying a recent revival, were categorized on the basis of skin tone, eye, and hair color. "Everybody was forced into four categories—winter, spring, summer, autumn. And sometimes that one category wasn't the best choice, but it was the only choice."<sup>74</sup> Someone categorized as an "autumn" was directed to wear only autumn colors and to purge her wardrobe of all other pieces of clothing, no matter how attached to them she had become. I think we ought to be able to include in our wardrobe any variety of things we wish, whether that be all autumn colors and nothing but autumn colors or all the colors of the rainbow. And we ought to be able to include in our lives whatever combination of gendered traits we wish, regardless of whether they have previously been put together into a package deal.

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73. Britannica Online, *Humour* (visited Dec. 6, 1998) <<http://www.eb.com:180/cgi-bin/g?DocF=micro/281/67.html>>.

74. Janet McCue, *Color Me Blue*, CLEV. PLAIN DEALER, Nov. 30, 1995, at 1E. The fact that new versions of "Color Me Beautiful" have expanded the number of options to twelve may be an improvement, but, from my perspective, not a solution to the problem. See MARY SPILLANE & CHRISTINE SHERLOCK, *COLOR ME BEAUTIFUL'S LOOKING YOUR BEST: COLOR, MAKEUP, AND STYLE* 22-23 (1995), the follow-up to CAROLE JACKSON, *COLOR ME BEAUTIFUL: DISCOVER YOUR NATURAL BEAUTY THROUGH THE COLORS THAT MAKE YOU LOOK GREAT AND FEEL FABULOUS!* (1980).